

United States Court  
Southern District of Texas  
FILE

MAR 11 2003

**Michael A. Milby, Clerk**

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THIS DOCUMENT RELATES TO:

G-02-463

MARK NEWBY, ET AL.,

Plaintiffs,

y.

ENRON CORPORATION, ET AL.,

**Defendants.**

AMERICAN NATIONAL INSURANCE  
COMPANY, FARM FAMILY LIFE  
INSURANCE COMPANY, AND  
SECURITIES RESEARCH AND  
MANAGEMENT, INC.,

Plaintiffs,

y.

LEHMAN BROTHERS HOLDINGS INC.,  
LEHMAN BROTHERS, INC., LEHMAN  
BROTHERS COMMERCIAL PAPER, INC.  
AND JOHN PRUSER.

**Defendants.**

CIVIL ACTION NO. H-01-3624  
CONSOLIDATED CASES

CIVIL ACTION NO. G-02-463 ,  
JURY

## DLI-5751412v5

#1273

Defendants Lehman Brothers Holdings Inc., Lehman Brothers Inc., Lehman Brothers Commercial Paper Inc., and John Pruser respectfully submit this Supplemental Memorandum of Authority in Opposition to Plaintiffs' Motion to Remand to bring to the Court's attention the March 3, 2003 decision of The Honorable Denise L. Cote in *New York City Employees' Retirement System, et al. v. Bernard J. Ebberts, et al.*, No. 02 Civ. 8981 (DLC) (S.D.N.Y.) (hereinafter "*NYCERS*") (slip opinion attached as Exhibit A to the Supplemental Affidavit of David E. Miller (hereinafter "Slip op.")). The *NYCERS* decision provides further support for the fact that this Court has subject matter jurisdiction over this dispute because it is "related to" the Chapter 11 bankruptcy case of debtor Enron Corporation ("Enron") through, among other things, the existence of the express contractual indemnification and contribution claims defendants have against Enron. (See Defendants' Notice of Removal at 4-5; Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand at 3-8.)<sup>1</sup>

The *NYCERS* action is part of the nationwide litigation arising out of the collapse of the former telecommunications giant, WorldCom, Inc. (Slip op. at 4.) Like the *Newby* litigation, the WorldCom securities litigation is now a consolidated class action, *In re WorldCom, Inc. Securities Litigation*, No. 02 Civ. 3288 (DLC), with a centralized Multi-District Litigation forum in the United States District Court for the Southern District of New York. (*Id.* at 5.) Also like Enron, WorldCom filed for bankruptcy under Chapter 11 shortly after the influx of litigation, thus staying all claims against WorldCom. (*Id.*)

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<sup>1</sup> In support of their motion to remand, plaintiffs recently submitted the decisions in *Principal Global Investors LLC v. Citigroup, Inc.*, No. 4:02-CV-90615 (C.D. Iowa Feb. 20 2003), and *OCM Opportunities Fund III, L.P. v. Citigroup, Inc.*, No. LA02-99911XX (Bankr. C.D. Cal.). Those courts erred in remanding those cases to state court, however, and defendants in the *Principal Global* action have asked the court to reconsider its decision in light of the *NYCERS* opinion, and defendants in the *OCM* action have appealed from the ruling in that case.

In addition to the consolidated class action complaints in the WorldCom litigation, numerous individual actions were filed by state pension funds and others in state courts across the country. The defendants in those cases, including 18 "Underwriter Defendants," removed the state court actions to federal court "on the basis of the litigation's relationship to WorldCom's bankruptcy." (*Id.* at 3.) Municipal pension funds that had brought an individual action in state court moved to remand their action for lack of federal subject matter jurisdiction. (*Id.* at 12.) In response, the Underwriter Defendants argued "that subject matter jurisdiction exists because the NYCERS action is 'related to' WorldCom's bankruptcy principally through the indemnification and contribution rights these Defendants have asserted against WorldCom." (*Id.* at 12-13.)

Relying on the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), and other "persuasive authority," including Fifth Circuit authority, Judge Cote held that "jurisdiction over a third party action exists where a claim for indemnification or contribution arising from that litigation has a conceivable effect on a bankruptcy proceeding" and "where there is a 'reasonable' legal basis for the claim." (Slip op. at 16-21 (citing, among other cases, *Arnold v. Garlock*, 278 F.3d 426 (5th Cir. 2001); *In re Canion*, 196 F.3d 574 (5th Cir. 1999)).) In particular, Judge Cote noted that, based on the *Pacor* test, "[s]everal Circuit Courts of Appeals have also found jurisdiction over third party litigation based on an indemnification or contribution claim that has a conceivable effect on the debtor's estate." (*Id.* at 17-19 (citing *In re El Paso Refinery, LP*, 302 F.3d 343 (5th Cir. 2002); *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir. 1997); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996); and *In re Wolverine Radio Co.*, 930 F.2d 1132 (6th Cir. 1991)).)

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(continued...)

In light of the NYCERS decision, this Court should reject the rulings in *Principal Global* and *OCM*.

Finding that the case against the Underwriter Defendants was necessarily entangled with WorldCom's conduct, Judge Cote held that there was a "reasonable basis" for the Underwriter Defendants' contribution claims against WorldCom sufficient to support "related to" jurisdiction:

A finding that . . . [the] Underwriter Defendants are liable is entirely dependent on a finding that WorldCom engaged in wrongful conduct. Since the conduct of WorldCom and these Defendants was indisputably intertwined, the theories of liability pressed by NYCERS are necessarily interconnected with these Defendants' rights to contribution. Because the effect of contribution claims on the bankruptcy estate is at the very least 'conceivable,' the NYCERS action is related to the bankruptcy and subject to the jurisdiction of this Court.

(Slip op. at 23.)<sup>2</sup> Accordingly, Judge Cote denied the motion to remand and retained jurisdiction over the action. (*Id.*) See also *Belcufine*, 112 F.3d at 636; *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997).<sup>3</sup> This Court should reach the same result here, which would be in accord with its denial of the remand motion in *American National Insurance Co. v. J.P. Morgan Chase & Co.*, No. G-02-299 (S.D. Tex. Aug. 9, 2002) (Docket No. 995 at 15-16).

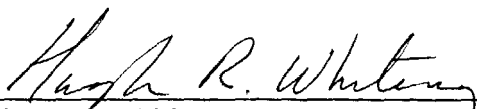
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<sup>2</sup> Because defendants' statutory contribution claims alone were enough to support "related to" jurisdiction, the court found "no need to address" the contractual indemnification claims also held by the Underwriter Defendants. (Slip op. at 23 n.19.)

<sup>3</sup> In so ruling, Judge Cote distinguished the very language in *Pacor* upon which the court in *Principal Global* based its remand decision. (Slip op. at 26 ("[D]espite the *dicta* in *Pacor* on which NYCERS relies, *Pacor* should not be read as requiring a judgment to have been entered against a third party defendant before the third party action can ever be found to be 'related to' the bankruptcy proceeding. It is more consistent with the holding and all of the language in *Pacor* to read it as requiring, in effect, that there be a reasonable basis for a claim against the estate in order to find that the third party litigation could conceivably affect the bankruptcy estate.")) Judge Cote also held that abstention – even if it was available – would be contrary to the interests of judicial economy, particularly in a large, nationwide and multi-district litigation. (Slip op. at 47-50 (declining to follow *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002), a case relied upon by plaintiffs here).)

Dated: March 11, 2003

Respectfully submitted,

  
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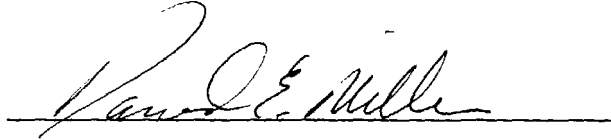
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on plaintiffs' counsel of record in this matter via overnight delivery and via posting to [www.esl3624.com](http://www.esl3624.com), on this the 11th day of March 2003.

A handwritten signature in cursive script, appearing to read "David E. Miller", is written over a horizontal line.